

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH

&

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

FAO.No. 25 of 2007

AGAINST THE ORDER DATED 21/12/2006 IN EA 565/1995 IN E.P.NO.385 OF 1989 IN
OS.109/1986 of ADDL.SUB COURT,KOTTAYAM

APPELLANT/PETITIONER/4TH JUDGMENT DEBTOR

P.K.KURUVILLA,
S/O.KURUVILA KURUVILA, AGED 65 YEARS,
PUTHIYAPARAMBIL HOUSE, (P.O) SOUTH PAMPADY,
KOTTAYAM DISTRICT.

BY ADV. SRI.C.VALSALAN
SRI.K.RAKESH ROSHAN
SMT.THUSHARA.V

RESPONDENT: COUNTER PETITIOENR/DECREE HOLDER

THE CORPORATION BANK,
ERNAKULAM BRANCH, CLOTH BAZAR ROAD,
ERNAKULAM, REP.BY IT'S MANAGER.

BY ADV. SRI.S.B.PREMACHANDRA PRABHU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 22/08/2007,
THE COURT ON 23/08/2007 DELIVERED THE FOLLOWING:

I.A.NO.238/2007 IN F.A.O.NO.25/2007

DISMISSED

SD/- KURIAN JOSEPH, JUDGE

23/8/2007

SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

AHZ/

KURIAN JOSEPH & K.T.SANKARAN,JJ.

F.A.O. NO. 25 OF 2007

Dated this the 23rd August, 2007

JUDGMENT

SANKARAN, J.

The questions arising for consideration in this Appeal are:

- (1) Could the executing court impose a condition for payment of part of the decree amount as a condition for excluding the house and appurtenant land of the judgment debtor from the purview of the court auction sale?
- (2) Could the executing court refuse to exclude from sale a portion of the property of the judgment debtor on the ground that taking into account the upset price fixed earlier, the decree amount would not be satisfied if a portion of the property is excluded from sale ?
- (3) In view of the wide disparity between the value suggested by the decree holder and the judgment debtor, was the court below justified in fixing the upset price, without any enquiry and in the absence of any data for fixing the upset price ?
- (4) Whether clause (a) of Sub Rule (2) of Rule 66, Order XXI of the Code of Civil Procedure would apply to court auction sale in execution of a charge decree?

2. Judgment debtor No. 4 is the appellant. He challenges the order passed by the executing court dismissing his application for setting aside sale under Order XXI Rule 90 of the Code of Civil Procedure(hereinafter referred to as C.P.C.). On 12-12-1986, a decree was passed against the defendants including the appellant herein for realization of a sum of Rs. 6,49,675. 15 with interest and costs. A charge decree was passed, making the property belonging to the appellant a charge for the decree amount. The decree was transferred from Sub Court, Ernakulam, to Sub Court, Kottayam for execution. In the Execution Petition filed by the respondent-

decree holder, the properties of the appellant, consisting of two items of immovable property, were sought to be sold. Item 1 consists of 1.80 acres of land with a house therein. The extent of item 2 is 1 acre and 250 sq. links.

3. The property was sold on 31-7-1995. The decree amount due was shown as Rs. 18,97,770.15 in the sale proclamation. At the auction sale, the decree holder purchased item 1 for Rs. 5,40,000/- and item 2 for Rs. 3,51,000/-. For the court auction sale, no bidder other than the decree holder was present. Even after the sale of the property of the appellant, the decree debt is not realized. The records would reveal that permission was granted to the decree holder to bid at the auction.

4. The appellant filed E.A. No. 565 of 1995 under Rule 90 of Order XXI C.P.C. to set aside the sale. The executing court dismissed the application. On Appeal as C.M.A. No. 161 of 1997, the High Court allowed the appeal, set aside the order and remanded the matter to the executing court for fresh disposal. Taking into account the submission made by the appellant that he was prepared to deposit Rs. 10 lakhs, the remand was made conditional on deposit of the amount. The appellant deposited Rs. 10 lakhs within the time stipulated. The court below considered the application on the merits and dismissed the application. The present Appeal is filed challenging that order.

5. During the pendency of C.M.A. No. 161 of 1997, stay was granted on condition of deposit of Rs. 5 lakhs by the appellant. He did not comply with the interim order. Therefore, sale was confirmed and the decree holder took delivery of the property on 24-6-1998.

6. To comprehend the contentions raised by the parties, it is necessary to state as to what transpired before sale. In the draft sale proclamation, the decree holder suggested the value of the property in items 1 and 2 at Rs. 35,000/- each. In the objections filed by the judgment debtor, he stated that the value of the property as suggested by the decree holder is too low and that the property is situated close to Pampady town. The judgment debtor stated that the properties would fetch a value of Rs. 6,000/- per cent of land. It would appear that the court fixed the upset price at Rs. 3,000/- per cent for item 1 and Rs. 3,500/- per cent for item 2. It would also appear that no enquiry was conducted by the executing court before fixing the upset price to ascertain the value of the property sought to be sold. No judicially considered order was passed while fixing the upset price. As directed by the court, the decree holder produced a draft sale proclamation incorporating the value as suggested by the decree holder and by the judgment debtor and the upset price fixed by the court. The sale proclamation published in the case shows the very same details.

7. On 12-1-1994, the appellant herein filed E.A. No. 30 of 1994 before the executing court praying to exclude the house and appurtenant land having an extent of 50 cents from the purview of sale. In the application, the appellant herein contended that it was not necessary to sell the entire extent of land for realization of the decree debt. He contended that the land would fetch a value of Rs. 10,000/- per cent or at least above Rs. 6,000/- per cent. The land would fetch a total value of Rs. 16,80,000/- and including the house, it would fetch Rs. 18,30,000/- . It was contended that even if the house with appurtenant land is excluded, the decree would be satisfied by sale of the rest of the land. The executing court passed an order dated 7-6-1994 in E.A. No. 30 of 1994, which reads as follows:

“Heard. As per his version the property is worth Rs. 6,000/- per cent. In case he deposits within 2 months 1 ½ lakh rupees the portion asked for exemption from sale will be allowed. Proclaim and sell the rest on 7-8-1994 or the whole if 1 ½ lakhs not deposited.”

The order dated 7-6-1994 referred to above was reviewed on the application of the decree holder. In the review petition (E.A. No. 368 of 1994), the decree holder stated that the order was passed without hearing the counsel and by inadvertence. The executing court allowed the review petition by the order dated 25-6-1994. The order reads as follows:

“Heard. It is noticed that upset price fixed at Rs. 3,000/- for item No. 1 & Rs. 3,500/- for item No. 2. Based on this calculation, even if the entire property is sold, the decree debt will not be satisfied. So the prayer for review allowed. Proclaim and sell.”

8. From the facts stated above, the following aspects are clear: (1) The court below did not consider on the merits as to what was the value of the property and whether it was necessary to sell the whole extent of property (2) while fixing the upset price, the court below did not pass a considered order after taking into all the relevant facts; (3) The order passed to exclude 50 cents of land and house thereon from sale was reviewed on the ground that upset price was fixed earlier and on that basis, it was held that sale of a portion of the property was not sufficient to realize the decree debt; and (4) The executing court originally excluded 50 cents of land and house from sale on imposing a condition of payment of Rs. 1.5 lakhs by the judgment debtor.

9. In view of the second proviso to sub Rule (2) of Rule 66 of Order XXI C.P.C., it was not necessary for the executing court to fix an upset price. (2nd proviso reads as follows: “Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties”).

10. In **Gajadhar Prasad V. Babu Bhakta Ratan and others: A.I.R. 1973 S.C. 2593**, the Supreme Court held that all the necessary facts required under Rule 66 should be incorporated in the sale proclamation and the purchaser should be left to judge the value for himself. It was held thus:

“If the execution court does not, as it did not in the case before us, apply its mind or give any consideration whatsoever to the objections of the judgment debtor, we think a material irregularity would be committed by the execution Court. It is not necessary for the execution Court to order the insertion of a judicially passed order in the sale proclamation itself, but, it should pass an order showing that it applied its mind to the need for determining all essential particulars, which would reasonably be looked for by a purchaser, and which should be inserted in the sale proclamation. The order should show that it considered the objections, if any, of the decree holders or the judgment debtors, as the case may be. It should not merely accept unhesitatingly the ipse dixit of one side. We think that the execution Court had not performed its duty fairly and reasonably in this case. After embarking on the difficult task of valuation, it rejected the judgment debtors’ figures by merely observing that they are exaggerated and practically accepted without hesitation whatever the decree holders submitted, but this valuation was proved to be incorrect judged by the results of auction sales taken as a whole.”

11. In **Desh Bhandhu Gupta Vs. N.L.Anand and another: 1994 (1) S.C.C. 131**, it was held that Rule 66 (2) (e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. The essential facts which have a bearing on the very material question of value of the property and which could assist the

purchaser in forming his own opinion must be stated. The Supreme Court decision in Gajadhar Prasad's case was followed in Desh Bhandhu Gupta's case.

12. The scope and ambit of Rules 64 and 66 of Order XXI C.P.C. was considered by the Honourable Supreme Court in **Ambati Narasayya Vs. M.Subba Rao and another: A.I.R. 1990 S.C. 119, Desh Bhandhu Gupta Vs. N.L.Anand and another: 1994 (1) S.C.C. 131; M/s Shalimar Cinema Vs. Bhasin Film Corporation: A.I.R. 1987 S.C. 2081; Balakrishnan Vs. Malaiyandi Konar: (2006)3 S.C.C. 49 = 2006 (1) K.L.T. 926 (S.C.)** and by the Kerala High Court in several decisions including the decision in **M/s Beaver Estates Pvt. Ltd. And another Vs. I.C.D.S. and others: I.L.R. 2006 (2) Kerala 309= 2006 (2) K.L.T. S.N.71; Bahuleyan Vs. Moosa: 2006 (4) K.L.T. 882:ILR 2006 (4) Kerala 118.** It was held by the Honorable Supreme Court and this Court that the executing court should apply its mind and decide whether it is necessary to bring the whole property to sale or whether it is sufficient to bring only a portion of the property to sale to satisfy the decree. **In Balakrishnan Vs. Malaiyandi Konar (Supra),** with reference to Rule 64 of Order XXI C.P.C., the Hon'ble Supreme Court held thus:

“The provision contains some significant words. They are “necessary to satisfy the decree”. Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi V. Pujari Padmavathamma (AIR 1977 S.C. 1789). In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the Court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. See: Ambati Narasayya V. M.Subba Rao and Anr. 1989 Suppl. (2) SCC 693). The duty cast upon the Court to sell only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S.Mariyappa (Dead) by LRs. And Ors. V. Siddappa and Anr. (2005) 10 SCC 235).”

13. The proclamation of sale is intended to assist the intending bidders in ascertaining the nature and real value of the property. The procedure prescribed in the Code of Civil Procedure in settling the sale proclamation and in publishing the same would disclose the importance of the existence of a proper proclamation of sale in court action sale. If the court fixes an upset price which does not reflect at least an approximately real value of the property, the intending bidder would be misled by the same. This would, sometimes, result in fetching a low price at the court auction sale. Fixing upset price in a mechanical manner, taking an average

of what is stated by the decree holder and the judgment debtor, a practice prevalent in executing courts, would be against the mandate of Rule 66 of Order XXI C.P.C. Both the decree holder and the judgment debtor would be put to prejudice if a stranger purchases immovable property in court auction for a low price. If the decree holder purchases the property for a low value, which does not even wipe off the decree debt, the judgment debtor would be put to great prejudice. A stranger- auction purchase runs the risk of the sale being setting aside if a proper price is not fetched in court auction due to the procedural violation in drawing up the proclamation. Drawing up of a proper proclamation of sale would be to protect the interests of the decree holder, judgment debtor and stranger - auction purchaser.

14. The executing court was not justified in fixing the upset price at Rs.3,500/- and Rs.3000/- per cent of land, without there being any relevant data on record to arrive at such a conclusion. That the decree holder had suggested a ridiculously low valuation is clear from the draft sale proclamation. The total price for more than 2.80 acres with improvements and a residential house was shown as Rs. 70,000/- by the decree holder. Even according to the decree holder, there are 110 coconut trees and 100 rubber trees in the property. The decree holder purchased the properties for Rs. 8,91,000/- Since the court fixed the upset price, the decree holder could not make a lesser bid. There were no other bidders other than the

decree holder bank. Even after sale of immovable properties, the decree holder bank could not realize the entire decree debt and more than Rs. Ten lakhs is still due. We are of the view that the decree holder bank was not all fair to the court and to the judgment debtor. The decree holder in this case is not a private individual; it is a bank. By showing a ridiculously low valuation, the bank really misled the court. Great injustice was hence caused to the appellant in selling his properties in court auction for a song.

15. The court below was not justified in imposing a condition of deposit of Rs. 1,50,000/- as a condition for excluding 50 cents of land and the residential building thereon from the purview of sale. It is the duty of the court to see that only that much property which is sufficient to satisfy the decree debt is brought to sale. The court cannot impose conditions on the judgment debtor as a precondition for discharging that duty cast on the court. By the order dated 7-6-1994 in E.A. No. 30 of 1994, the executing court allowed the prayer of the judgment debtor to exclude 50 cents. This means the court was satisfied that it was not necessary to sell the whole of the property. After arriving at such satisfaction, the court was not justified in imposing conditions for exercising the jurisdiction vested in it. It is not a discretionary jurisdiction. It is the duty cast on the court. It is apposite to quote what the Supreme Court said in **Ambati Narasayya V. M. Subba Rao and another: A.I.R. 1990 S.C. 119,** while considering the scope of Rule 64 of Order XXI C.P.C.

“It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.”.....
..... “There is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored.”

16. The court below did not even allow the judgment debtor to comply with the order in E.A. No. 30 of 1994. That order was reviewed on the application of the decree holder in E.A. No. 368 of 1994 on the ground that upset price was fixed earlier. We are of the view that the court below was not right in allowing the review petition. That the upset price was fixed by the court is not a ground to refuse to consider the request of the judgment debtor to exclude his residential house and appurtenant land from the purview of sale. What is relevant is whether sale of the whole property is necessary to satisfy the decree debt and not whether on the basis of the upset price fixed by the court (which itself was illegal in this case) sale of the whole property is necessary. Value of the property as

such is relevant, and not value of the property computed on the basis of the upset price that is relevant, in considering such request. The unfair attitude of the decree holder is clearer, when we consider the review petition filed by it.

17. The learned counsel for the respondent- decree holder contended that Rules 64 and 66 of Order XXI would not apply to a charge decree and therefore the judgment debtor could not contend that sale of a portion of the property was sufficient to satisfy the decree debt. He refers to the expression “any property attached by it and liable to sale” occurring in Rule 64 of Order XXI, in support of this contention.

18. Section 51 of the Code of Civil Procedure states the powers of the court to enforce execution. The relevant portion of Section 51 reads thus:

“51. Powers of Court to enforce execution.- Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section;

- (d) by appointing a Receiver;
- (e) in such other manner as the nature of the relief granted may require.”

19. Section 51 is the source of power of the executing courts in executing various types of decrees. The mode of execution and the procedure thereof are provided in Order XXI C.P.C. Section 51 (b) provides for attachment and sale without attachment. In execution of money decrees, attachment of the immovable property of the judgment debtor could be resorted to before sale. Attachment is not required in execution of a money decree charged on immovable property, if execution is sought by sale of that property. In the case of mortgage decrees also, attachment is not required. Rule 54 of Order XXI provides for attachment of immovable property. Rule 64 states that any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof, as may seem necessary to satisfy the decree, shall be sold. It is true that in Rule 64, the words “any property attached” occur. Rule 66 is also relevant in this context. The relevant portion of Rule 66 reads thus:

“66. Proclamation of sales by public auction: (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

- (a) the property to be sold, or, where a part of the property would be sufficient to satisfy the decree, such part;

.....”

Sub Rule (3) of Rule 66 provides that every application for an order for sale under that rule shall be accompanied by a statement containing the matters required by sub rule (2) to be specified in the proclamation. We are of the view that Rule 66 (2) (a) would apply to a charge decree as well. The specific mention of attachment of property in Rule 64 would not take away the application of Rule 66 to a decree for the execution of which no attachment is necessary. Rule 64 makes provision for sale of attached property, while Rule 66 takes in cases covered by Rule 64 and also decrees where attachment is not necessary. A Division Bench in **K.Sankaranarayana Pillai V. S.P. Sankara Iyer: A.I.R. 1954 Travancore-Cochin 226** held that though Rule 64 refers in terms to “attached property”, the provisions therein contained would apply to all sales of immovable property in public auction by Court.

20. It is true that specific provision is made in Order XXXIV for sale of mortgaged property. We are not deciding in this case the question whether Rule 66 (2) (a) applies to a mortgage decree.

21. The learned counsel for the respondent- decree holder further contended that the judgment debtor was protracting the proceedings. The Execution Petition was filed in 1989 and the sale was held only in 1995. The learned counsel submitted that all the contentions now raised by the appellant are not seen raised in the application filed to set aside the sale. He also raised a contention that in view of Sub Rule (3) of Rule 90 of Order XXI, no application to set aside sale shall be entertained upon any ground which the appellant could have taken on or before the date on which the proclamation of sale was drawn up.

22. It is true that the Execution Petition was filed long back. It may also be true that the judgment debtor tried to protract the execution proceedings. But that is not a ground for selling the property of the judgment debtor without complying with the mandatory requirements of law. The court could effectively prevent the judgment debtor from protracting the proceedings. Even a judgment debtor who tried to protract the proceedings, is entitled to contend that he lost his property in a court action sale which was held in flagrant violation of mandatory procedural requirements and safeguards, and impugn such sale on those grounds. It is relevant in this context to note that in the earlier round of litigation, namely, C.M.A. No. 161 of 1997, the appellant offered to deposit Rs. Ten lakhs and the amount was deposited.

23. We do not find force and merit in the contention regarding the application of Rule 90(3) of Order XXI. It was held by the Supreme Court in **Desh Bandhu Gupta's case (supra)** that Rule 90(3) is not applicable where sale was held in violation of mandatory requirements of the Rules. The facts narrated above would show that the court below had not complied with the mandatory requirements of Rules 64 and 66 of Order XXI.

24. In the light of the facts and principles mentioned above, we are of the view that the court below was not right in dismissing the application for setting aside the sale. The facts and circumstances of the case and the evidence on record would show that sale is vitiated by material irregularity within the meaning of Rule 90 of Order XXI. The appellant has sustained substantial injury by reason of such irregularity.

Accordingly, we allow the Appeal, set aside the order passed by the court below and allow the application for setting aside the sale filed by the appellant. The confirmation of sale is also set aside. The decree holder would be entitled to appropriate towards the decree debt Rs. Ten lakhs deposited by the appellant and proceed with the execution for realization of the balance amount due under the decree. The court below shall draw up

fresh proclamation of sale in accordance with law in the light of this judgment. In the facts and circumstances, there will be no order as to costs.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge